Circuit Court for Howard County
Case No. 13-C-16-107740

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1191

September Term, 2020

TONY KIM

v.

MIN SUN KIM

Berger,
Reed,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell J.

Filed: July 15, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal concerns a complaint for modification of child custody filed in the Circuit Court for Howard County by Tony Kim, appellant, against Min Sun Kim, appellee.[1] In a written order entered on 19 November 2020, the circuit court found that there was "no material change in circumstances so grave as to warrant a reexamination of the recently adopted custody agreement." The court dismissed the complaint to modify custody and awarded attorney's fees against father and in favor of mother in the amount of $975. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents for our consideration two questions which we have re-ordered and re-phrased slightly as follows:

> I. Did the circuit court err in relying upon material outside the motion to dismiss "thus converting the matter into [a] Motion for Summary Judgment and improperly granting summary judgment" in favor of Appellee?
>
> II. Did the circuit court err in dismissing his complaint for modification of custody?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL BACKGROUND

The parties have one minor child, N.K., born in March 2006. On 22 November 2017, mother was granted an absolute divorce from father. The parties entered into an agreement, later incorporated into the judgment of absolute divorce, which resolved all issues of custody, child support, and property. The judgment of absolute divorce granted

[1] The circuit court ordered previously that Min Sun Kim "shall be restored to her maiden name, Min Sun Woo[.]"

Min Sun sole legal and primary physical custody of N.K. Among other things, the judgment of absolute divorce provided that father shall have "access/visitation" with N.K. on alternate weekends from Friday after school until Tuesday mornings, and visits on "alternate Fridays from Friday after school to Saturday morning at 9:00 a.m." Upon seven days' written notice, mother was to select four Friday nights "immediately preceding her weekend each school year" for N.K. to be with her. The parties would alternate weeks with N.K. during the summer and there was a specific schedule with regard to holidays.

On 18 January 2019, father filed an "*Ex Parte* Petition to Modify Child Custody" in which he alleged that "[r]ecent circumstances have given rise to the suspicion that N.K. ha[d] been neglected" and that his "well-being and health" had been "effected because of the actions" of mother. He asserted that N.K., who was enrolled in middle school at that time, went to the homes of "various" individuals for after-school care. Father did not know the identity of the after-school care providers or their locations. He asserted also that N.K. had gone fishing with a maintenance worker who was employed at the same school as mother, that on multiple occasions N.K. had stayed home alone after school, and that N.K. had spent time with "other strangers," even though father lived in close proximity and was available to help care for him as needed. Father complained also that N.K.'s clothes were too tight.

According to father, N.K. had expressed a desire to be with him after school. N.K. represented that he was not happy when he was with his mother, that he did not like his school, and that he felt unsafe staying with various people after school. Father asserted that N.K. was "sad and experiencing depressive symptoms as a result of the neglect of"

mother. He claimed mother had "never provided" an update "as to N.K.'s medical documents or health care providers." He sought sole legal and physical custody of N.K. and, alternatively, more time with him. In addition, father stated that he would be traveling out of the country to work at a university in Germany and suggested that N.K. could "attend a local school and have extended visitation with" him "on two or three occasions for the anticipated 8 to 9 month[]" European sojourn.

A hearing was held on father's petition. On 29 January 2020, the circuit court entered a written order in which it found that there was "no material change in circumstances" to warrant a modification of custody. The court clarified that both parents had access to N.K.'s medical, dental, and educational records. The court determined that mother had been "regularly updating" father with results from N.K.'s medical and dental appointments, and encouraged her to continue to do so. With regard to N.K.'s educational information, the court found that father had access to school records through the school system's online portal and that difficulties accessing information should be directed to the school system.

Less than six months later, father filed a petition for contempt in which he asserted that mother had denied him access to, and visitation with, N.K. He claimed that he had traveled to South Korea from April to June 2020, and that upon his return, mother denied him access to N.K. because he had not quarantined for a fourteen-day period, according to COVID protocols. He also claimed that he had been denied access to N.K. one weekend in October 2019. A hearing was held before a magistrate. In her findings of fact, the magistrate determined that mother failed to provide access to N.K. in October 2019 due to

the hospitalization of her father and that she did not intentionally disobey a court order. With regard to the two-week quarantine, the magistrate determined that mother "was acting in good faith based on health concerns and not willfully disobeying a Court Order." The magistrate recommended that father's petition for contempt be denied. On 7 October 2020, the circuit court denied the petition for contempt.

On 30 September 2020, prior to the entry of the court's order denying the petition for contempt, father filed another complaint to modify custody. He asserted that: N.K.'s "educational performance" had declined; in the Spring semester of 2020, N.K. failed a class; N.K. "expressed that he is miserable in his current school" and wished "to return to being home schooled by his Father;" N.K. had become depressed, socially withdrawn, and had lost a significant amount of weight in a short period of time; N.K. was left unsupervised when in his mother's care; and, N.K. is "often on his computer until 5:00 a.m." In addition, father claimed that mother had denied him access to N.K. on several occasions. He expressed a desire for N.K. to return to homeschooling. Father stated that he would be traveling to Copenhagen to do research at a university and suggested that N.K. could travel with him and attend a local school or continue his homeschooling there. He requested that he be awarded sole legal custody and primary physical custody of N.K., who would soon turn 15 years old. On 27 October 2020, fgather requested an emergency hearing on his complaint to modify custody. The following day, the court denied the request for an emergency hearing, stating that "[t]he facts alleged do not constitute an emergency."

Mother filed a motion to dismiss the complaint to modify custody. With regard to father's allegations that she had withheld visitation, she argued that the issue had been

addressed in father's earlier petition for contempt, which had been denied. She noted also that many of father's other allegations and arguments had been raised in the prior complaint to modify custody, which also had been denied. Mother argued that father failed to show a material change in circumstances so as to warrant a modification of custody. She stated, "[a]ll of the allegations relevant to custody modification were circumstances known to the trial court when it rendered the prior Order entered on January 29, 2020, just eight (8) months ago, and the Order denying [father's] Petition for Contempt entered on October 6, 2020." She maintained that "[a] custody order must be afforded some finality." Mother challenged father's allegation that N.K.'s academic performance had declined significantly and that he failed a class. In response, she attached to her motion to dismiss a copy of NK's report card for the 2019-20 school year. She pointed-out that father failed to allege anything new and was attempting to relitigate issues that had been determined previously. She argued that because father failed to show a material change in circumstances, he had failed to state a claim upon which relief could be granted and, as a result, the complaint to modify custody should be dismissed.

Father opposed the motion to dismiss on the ground that he alleged sufficiently a material change in circumstances and requested a hearing.

Without holding a hearing, the circuit court found that "there [was] no material change in circumstances so grave as to warrant a reexamination of the recently adopted custody agreement." The court stated that father "references the child in question suffering academic losses but provides no evidence beyond naked statements unsupported by evidence and directly refuted by the factual evidence provided by" mother. The court

granted the motion to dismiss and ordered father to pay to mother her attorney's fees in the amount of $975 incurred in opposing the complaint.

STANDARD OF REVIEW

In considering an appeal from the grant of a motion to dismiss for failure to state a claim under Maryland Rule 2-322(b)(2), the applicable standard of review is "whether the [circuit] court was legally correct." *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 350 (2019)(quoting *Blackstone v. Sharma*, 461 Md. 87, 110 (2018)). "Therefore, we review the grant of a motion to dismiss *de novo*. We will affirm the circuit court's judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised." *Id.* (citation and internal quotation marks omitted). In determining whether the complaint, on its face, discloses a legally sufficient cause of action, we must "'assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them.'" *Wireless One, Inc. v. Mayor and City Council of Baltimore*, 465 Md. 588, 604 (2019)(quoting *Floyd v. Mayor and City Council of Baltimore*, 463 Md. 226, 241 (2019)). *See also Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600, 609 (2017)(stating same). Dismissal is appropriate only when the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted. *Floyd*, 465 Md. at 241; *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 496-97 (2014)(quoting *RRC Ne., LLC v. BAA Maryland, Inc.*, 413 Md. 6388, 643-44 (2010)). Our review is "limited generally to the four corners

of the complaint and its incorporated supporting exhibits." *Wireless One*, 465 Md. at 604 (quoting *Floyd*, 463 Md. at 241). *See also State Center, LLC*, 438 Md. at 496-97 (stating same).

As explained in Maryland Rule 2-322(c), if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." There is, however, an exception to that rule. When "an extraneous document merely supplements the allegations of the complaint, and the document is not in dispute, consideration of the document [filed as an exhibit to the] motion to dismiss does not convert it into one for summary judgment." *Kemp v. Nationstar Mortg. Ass'n*, 248 Md. App. 1, 30 n.13, *cert. granted*, 471 Md. 285 (2020). "That is the case whether the complaint expressly refers to it . . . or if it's appended to a defendant's motion to dismiss." *Id.* (citations omitted).

DISCUSSION

When considering a request to modify custody, a trial court must engage in a two-step process. First, the court must determine whether there has been a material change in circumstances. *Santo v. Santo*, 448 Md. 620, 639 (2016); *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). A change is material if it affects the welfare of the child. *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012); *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). The requirement that there be a material change in circumstances is intended to preserve stability for the minor child and to prevent relitigation of the same issues. *Domingues v. Johnson*, 323 Md. 486, 498 (1991). If a material change of circumstances is not found, "the court's inquiry must cease." *Braun v. Headley*, 131 Md. App. 588, 610

(2000). If the court finds that there has been a material change of circumstances, it then considers what custody arrangement is in the best interest of the child. *Santo*, 448 Md. at 639. The burden is on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed. *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008).

I.

Appellant contends that the circuit court erred in relying on material outside his complaint, specifically N.K.'s report card, which he claims converted the motion to dismiss into a motion for summary judgment. He maintains that the court failed to provide him with "an opportunity to present material pertinent to a ruling on a motion for summary judgment" and improperly granted the motion. We disagree.

As we have noted already, pursuant to Maryland Rule 2-322(c), it is generally true that if, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside of the pleadings are presented, the motion shall be treated as one for summary judgment. But, when considering a document that merely supplements a complaint, the circuit court does not need to treat the motion to dismiss as a motion for summary judgment. *Kemp*, 248 Md. App. at 30 n.13. *See also Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 175 (2015); *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 710 n.4. (2015).

The difference between documents that are outside of a complaint and documents that merely supplement the allegations made in a complaint was discussed in *Margolis*. In

that case, we held that, although the plaintiff did not attach a deposit account agreement to his complaint, he referred to it and alleged repeatedly that its disclosures did not satisfy the Consumer Protection Act. *Margolis*, 221 Md. App. at 710 n.4. Because there was no dispute that the Deposit Account Agreement was the agreement between the parties, we determined that the trial court could regard it "as 'simply supplementing the allegations in the complaint.'" *Id.* We held that it was proper for the trial court to grant the motion to dismiss without treating it as a motion for summary judgment.

The Court of Appeals also applied that exception in *Smith v. Danielczyk*, 400 Md. 98 (2007), where the respondents alleged additional facts in their motion to dismiss and appended extraneous materials to the motion. *Id.* at 103-05. The Court of Appeals reasoned that because there was no apparent dispute regarding the materials or factual averments, it would "regard the exhibits and additional averments as simply supplementing the allegations in the complaint and consider the relevant facts pled in the complaint as so supplemented." *Id.* at 105.

That reasoning is portable here. Father alleged that N.K.'s academic performance had "significantly declined" and that he had failed a class. He referred to N.K.'s academic performance in the Spring of 2020, but failed to attach to the complaint a copy of the child's report card in support of his naked allegation. The parties do not dispute that the report card attached to mother's motion to dismiss was not reflective of N.K.'s report card or that it failed to reflect accurately his grades for the pertinent academic year. It is beyond cavil that N.K.'s report card is central to father's assertion that the child's academic performance had declined and that he failed a class. The report card was not a matter outside of father's

pleading, but rather a document that supplemented the allegations made in the complaint for modification of custody. As a result, the circuit court did not err in considering mother's motion to dismiss and the attached report card or in declining to treat the motion to dismiss as a motion for summary judgment.

II.

Appellant challenges the circuit court's decision to dismiss his complaint for modification of custody on the ground that there was "no material change in circumstances so grave as to warrant a reexamination of the recently adopted custody agreement." He takes issue with the circuit court's use of the words "so grave." We find no error in the court's use of those words. The words "so grave" do not indicate that the court applied an incorrect standard. It is clear that the circuit court determined that father failed to show a material change in circumstances as was required for a change in custody.

According to father, the allegations in his complaint for modification were unique from the allegations made in his prior request for modification. Specifically, he points to his allegations that N.K. had lost a significant amount of weight, that he was socially withdrawn and depressed, that his academic performance was suffering and he had failed a class, that he was on his computer until 5 a.m., that mother had denied access to N.K. on several occasions, and that N.K. had expressed a desire to return to homeschooling and live with him. We are not convinced.

N.K. was only eight months older at the time of the request for modification of custody that gave rise to the instant appeal than he was at the time of the hearing on the 2019 petition. In both proceedings, the court was presented with issues pertaining to the

physical growth spurt (or not) of N.K., who was at that time a teenage boy. Even assuming the truth of the allegation that N.K. had lost some unspecified, but "significant" amount of weight, there was nothing in that conclusory allegation to establish a material change in circumstances. Issues relating to N.K.'s mental health, desire to be homeschooled and live with his father, and father's desire to have N.K. travel abroad with him were also addressed in the prior proceeding. Even assuming the truth of those allegations, there was no showing that, eight months later, there had been a *material* change in circumstances. Likewise, allegations that mother failed to supervise properly N.K., or left him alone after school, and left him in the care of others were addressed in response to the 2019 petition. Even assuming the truth of father's contention that N.K. stayed on his computer until 5 a.m., that assertion was merely a reiteration of father's prior contention that mother failed to supervise properly N.K.. Thus, even assuming the truth of that contention, the circuit court could conclude reasonably that father had failed to show a material change in circumstances.

Similarly, Appellant's argument that mother denied him access to N.K. was considered by the court at a hearing on 21 September 2020 in response to father's July 2020 petition for contempt. The petition for contempt was denied. There was nothing to show that there had been a material change in circumstances since that determination.

The only new allegation was that N.K.'s academic performance was suffering and that he failed a class. Appellant argues that the circuit court "suggested" that he was required to provide evidence to overcome the motion to dismiss. We disagree. N.K.'s academic performance was invoked by father's allegations. Mother provided the report

card to supplement and refute father's claim that N.K.'s academic performance was suffering. The report card, the accuracy of which was not disputed, showed N.K.'s academic progress throughout the entire school year. The circuit court was not required to accept father's conclusory arguments over undisputed evidence of N.K.'s actual academic performance. For all these reasons, we conclude that the circuit court did not err in dismissing father's complaint for modification for failure to show a *material* change in circumstances.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.